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CHARLES ELMORE GROPLEY
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1943.

No. **443**
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HARDEN MORTGAGE LOAN COMPANY, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE TENTH CIRCUIT.**

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v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE TENTH CIRCUIT.**

The petitioner, Harden Mortgage Loan Company, a corporation, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit entered in the above entitled cause on July 20, 1943.

OPINIONS BELOW.

The memorandum opinion of the United States Board of Tax Appeals (R. 11-20) is not reported. The opinion of the Circuit Court of Appeals (R. 50-54) is reported in 137 F. 2d 282.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on July 20, 1943 (R. 54-55). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. Whether petitioner, engaged in the mining and selling of rock asphalt (used for road building), is entitled to deduct as ordinary and necessary business expenses under Section 23 (a) of the Revenue Act of 1938 the sum of \$32,937.75 paid in 1938 to one C. S. Beekman, or C. S. Beekman and Company, as commissions upon the sale of rock asphalt, when Beekman was an independent contractor, when the bulk of such sales was made to the Oklahoma State Highway Commission, and even though it be found and held that Beekman, or Beekman and Co., resorted to acts considered contrary to public policy in effecting such sales.

2. In the alternative, whether petitioner is entitled to deduct \$16,893.70 of the aforesaid commissions, which amount was paid to C. S. Beekman, or his nominee, in January, 1938, on sales made by him in 1937 before any partnership was organized and when there were no alleged practices contrary to public policy.

STATUTE INVOLVED.

The statute involved is Section 23 (a) of the Revenue Act of 1938, c. 289, 52 Stat. 447, the pertinent part of which is as follows:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) EXPENSES.—

(1) **IN GENERAL.**—All the ordinary and necessary expenses paid or incurred during the taxable year in

carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

* * * * * * *

STATEMENT OF THE CASE.

Petitioner is a corporation engaged in mining and selling rock asphalt with its principal office in Oklahoma City, Oklahoma (R. 12). In 1938 it kept its books on the accrual basis (R. 25).

Rock Asphalt is a blend of limestone rock and asphalt and of sand and asphalt and is used as a road building material. It is sold principally to cities, counties, and states. (R. 12.)

In 1933 or 1934 petitioner entered into an agreement with C. S. Beekman Co., at face value certain claims which it tioner's rock asphalt on a ten per cent commission basis, which arrangement has continued to the present time. The agreement provided that Beekman was to receive his commissions only when petitioner received payment for the materials sold. C. S. Beekman had been acting as sales agent for producers of paving materials and pavements in the State of Oklahoma, and for contractors building state highways, for nearly 30 years. Not only did he represent producers other than the petitioner, but he also represents concerns selling road machinery and equipment. (R. 13.)

During 1937 Beekman made sales of rock asphalt to the Oklahoma State Highway Commission amounting to more than \$170,000.00. By the end of that year the road building funds of Oklahoma had become exhausted and payments to petitioner were long delayed. In January, 1938, Beekman was short of funds and asked petitioner for an advance on commissions which would be due him when petitioner was

paid for the materials sold. Petitioner did not have funds with which to pay Beekman but assigned to his nominee, C. S. Beekman Co., at face value certain claims which it had against the State aggregating \$16,893.70, which amount approximated the commissions which would be payable to Beekman on the material sold. (R. 13, 14, 29.)

In the early part of 1938 Beekman became almost totally blind and needed assistance in carrying on his sales work. He first called in his brother to assist him and, shortly after the State Legislature adjourned in the early part of 1938, he formed a partnership under the name and style of C. S. Beekman & Company, composed of himself, his brother, two members of the Oklahoma Legislature and another party who was more or less active in State politics. (R. 14.) The main task of Beekman and his partners was to carry on educational programs among the people in various sections of the State where roads were to be built in order to get them to demand rock asphalt roads (R. 17, 36, 46-47). After the partnership was formed Beekman asked petitioner, in drawing checks for commissions due him for rock asphalt sales, to make such checks payable to the order of C. S. Beekman & Co. This was done. (R. 14.)

In addition to the above mentioned assigned claims petitioner in 1938 paid to C. S. Beekman & Co. the sum of \$16,044.05 as commissions on other sales. The total commissions paid by petitioner in 1938 amounted to \$32,937.75. (R. 14.)

Petitioner sold its rock asphalt in Oklahoma at a uniform price of \$4.25 per ton f.o.b. the mine (R. 13), and it kept the price posted in the Highway Department of the State at all times (R. 35). Petitioner exercised no control over Beekman as to how he spent his commission money and never instructed him with regard to whom he should approach in the matter of making sales (R. 34, 36, 47). Petitioner's vice-president and general manager did not know until long after 1938 that Beekman had formed his partnership, or who made up its membership, and he never met with the partners in a partnership meeting (R. 43-44, 48). Beekman never approached a State official or offered him money

to recommend petitioner's product and never paid any money for that purpose (R. 48).

In auditing petitioner's 1938 income tax return respondent disallowed as a deduction the selling commissions of \$32,937.75 paid to Beekman & Company on the ground that payment thereof was against public policy (R. 8). The Tax Court and the Circuit Court of Appeals sustained respondent's action (R. 19, 54).

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court erred as follows:

1. The Circuit Court erred (as did the Tax Court) in disregarding the uncontradicted testimony of C. S. Beekman, a witness on behalf of the respondent, and in assuming (contrary to such testimony—R. 47) that petitioner had knowledge of any alleged political influence on the part of Beekman and/or his associates in selling rock asphalt.

2. The Circuit Court erred (as did the Tax Court) in holding petitioner guilty of practices contrary to public policy, when petitioner merely contracted with Beekman, an independent contractor, to sell its product on a commission basis, even though it be held that Beekman and his associates did (unknown to petitioner) resort to practices contrary to public policy.

3. The Circuit Court erred (as did the Tax Court) in holding that petitioner is not entitled to deduct commissions paid to C. S. Beekman, or his nominee—Beekman & Co., even though it be held that Beekman and/or his associates resorted to political influence in order to make sales, and even though such fact was known to petitioner.

4. The Circuit Court erred (as did the Tax Court) in holding that petitioner is not entitled to deduct the commissions paid Beekman and/or his associates, on the assumption that they were guilty of practices contrary to public policy, when there are no facts in the record to support

such a holding, other than the fact that they had to deal with the agency set up by the State to receive them and deal with them, and in the manner prescribed by said agency.

5. In any event, the Circuit Court erred (as did the Tax Court) in holding that petitioner is not entitled to deduct that portion of the commissions paid by petitioner in 1938 on sales made by Beekman in 1937 at a time when Beekman had no partners and no associates, and when there were allegedly no practices on his part contrary to public policy.

6. The Circuit Court erred (as did the Tax Court) in holding that petitioner was not entitled to deduct the commissions paid to Beekman and/or Beekman & Co. in 1938 as ordinary and necessary business expenses under the provisions of Section 23 (a) of the Revenue Act of 1938, even though it be found that Beekman and his associates were friendly to the Oklahoma State Highway Commission, when there is no prohibition against such deduction in either the law or the regulations.

7. The Circuit Court erred in affirming the decision of the Tax Court.

REASONS FOR GRANTING THE WRIT.

The decision of the Tenth Circuit in this case is in conflict with decisions of the United States Circuit Courts of Appeals for the Fifth and Seventh Circuits in *Alexandria Gravel Company v. Commissioner*, 95 F. 2d 615, and *Heininger v. Commissioner*, 133 F. 2d 567, respectively. This Court granted a writ of certiorari in the latter of these cases, 319 U. S. . . . , which case is now pending in this Court.

The Circuit Court of Appeals in the *Heininger* case held that the taxing statutes made no distinction between net income from a legal and an illegal business and that, for the Court to do so, would amount to judicial legislation. The Court said in that case—

If the position of the respondent is sustained, and the attorneys' fees and expenses disallowed as a deduction in the instant case, then no business expense of an illegal business is deductible, and such business would be taxable on its gross income. *Congress has not said that that discrimination shall be made.* (Italics supplied.)

Petitioner does not admit that the record herein shows any conduct on its part or on the part of Beekman, the independent contractor who sold its product, which is contrary to public policy. If, however, it should be held that the commissions paid to Beekman & Co. were paid to that company for exerting political influence (and are, therefore, contrary to public policy), it is submitted that such payments still are deductible in computing taxable income because Congress has made no distinction between the taxable income of legal and illegal businesses.

The general principle is important and the phase of it involved in this proceeding should be considered by the Court along with the question in the *Heininger* case.

In any event, practices allegedly contrary to public policy in 1938, should not preclude deduction of \$16,893.70, the commissions earned by Beekman in 1937—the year prior to the alleged illegal practices complained of herein.

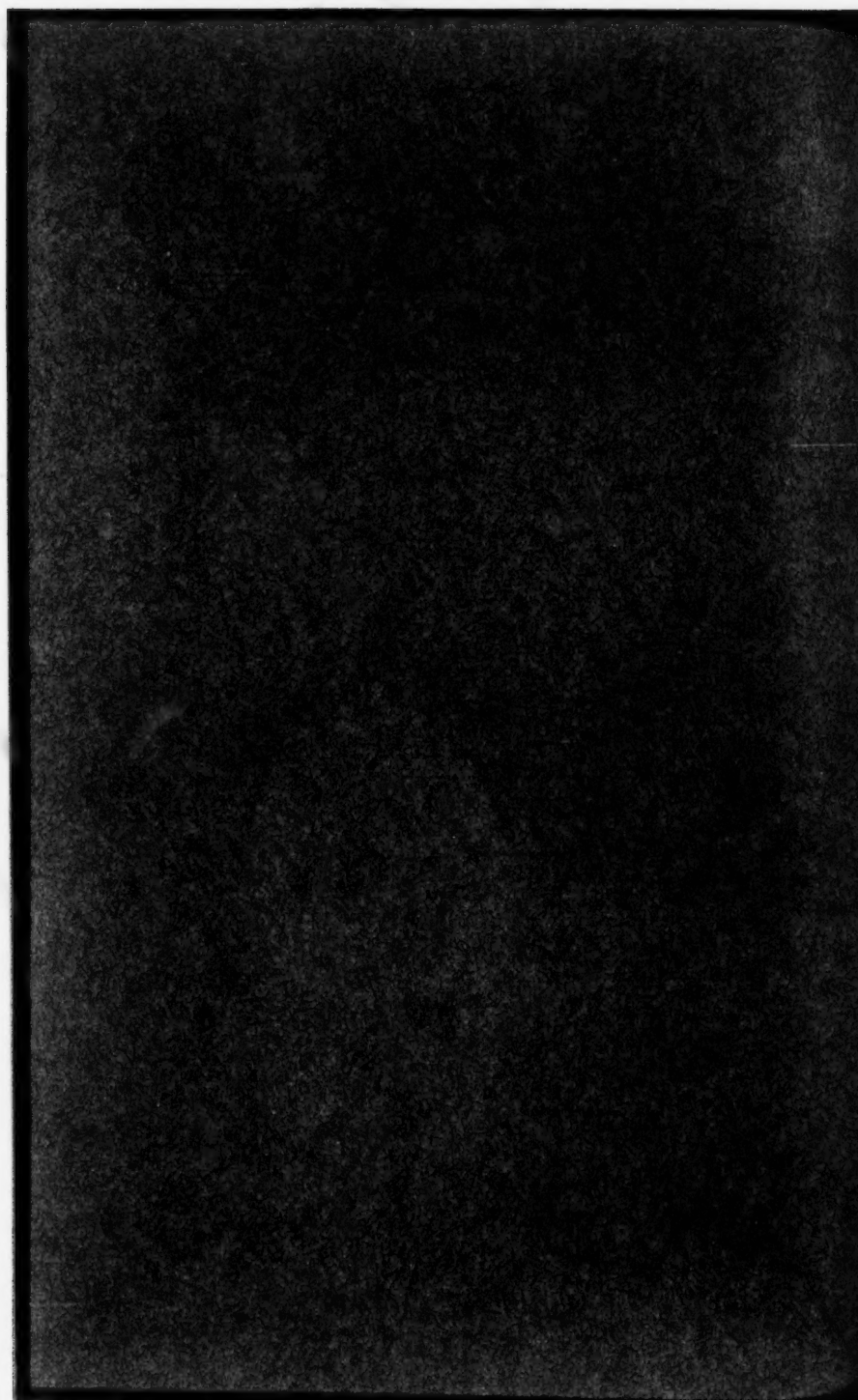
Since the Court already has under consideration the identical question here involved, petitioner's rights should be protected until the issue is finally determined.

CONCLUSION.

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

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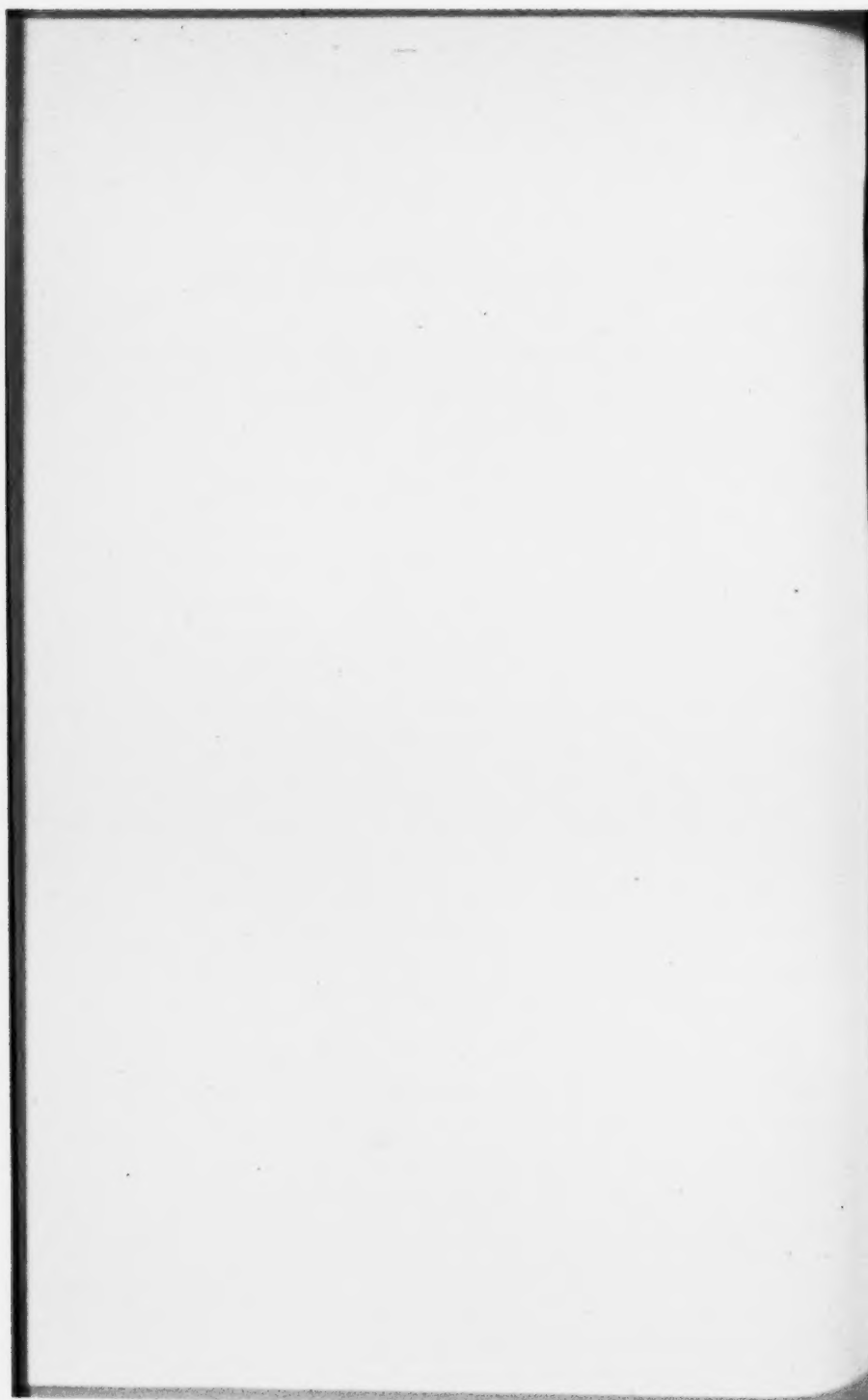
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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 433

HARDEN MORTGAGE LOAN COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE TENTH
CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 11-20) is not officially reported. The opinion of the Circuit Court of Appeals (R. 50-54) is reported at 137 F. 2d 282.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 20, 1943 (R. 54-55). Petition for a writ of certiorari was filed October 20, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the taxpayer, which was engaged in the mining and selling of rock asphalt for road building, may deduct as ordinary and necessary business expenses under Section 23 (a) of the Revenue Act of 1938 certain amounts which it paid in 1938 in connection with the sale of rock asphalt to the State Highway Commission of Oklahoma and to contractors for use in building State highways in Oklahoma, pursuant to the specifications of the Oklahoma State Highway Commission.

STATUTES AND OTHER AUTHORITIES INVOLVED

The statutes and other authorities involved will be found in the Appendix, *infra*, pp. 9-11.

STATEMENT

Taxpayer is a corporation with its principal office in Oklahoma City, Oklahoma (R. 12). It keeps its books on the accrual basis (R. 25). Through its Southern Division it operates strip mines at Dougherty, Oklahoma, from which it produces and sells lime-rock asphalt and sandstone to blend into rock asphalt. Rock asphalt is used as a road-building material, and is sold principally to cities, counties, and states. (R. 12.)

In 1933 or 1934 the general manager of petitioner's Southern Division (then a subsidiary corporation), R. D. Farmer, entered into an oral agreement with C. S. Beekman by which the latter was engaged to sell the company's rock

asphalt on a commission basis, an arrangement which has been continued to the present time. The agreement provided that Beekman was to receive his commissions only when taxpayer received payment for the material sold. Beekman had been acting as sales agent for producers of paving materials and pavements in the State of Oklahoma, and for contractors building state highways, for nearly thirty years. Beekman also represented concerns which sold road machinery and equipment. (R. 13.) He has always worked on a commission basis, never on a salary (R. 47).

During 1937 Beekman sold more than \$170,000 of taxpayer's product to the Oklahoma State Highway Commission. By the end of that year the road-building funds of Oklahoma were exhausted. In January 1938, Beckman was short of funds and asked the taxpayer for an advance on commissions earned but not due. The taxpayer did not have funds with which to pay Beekman, but assigned to his nominee, C. S. Beekman & Company, at face value, certain claims which it had against the State aggregating \$16,893.70. (R. 13.) After the assignment taxpayer paid to Beekman's nominee, C. S. Beekman & Company, \$16,044.05 in checks as commissions on other sales, made in 1938.¹ Thus the total commissions paid

¹ The \$16,893.70 appears to have been paid October 31, 1938 (R. 30).

to and received by Beekman's nominee in 1938 amounted to \$32,937.75. (R. 14, 30.)

In the early part of 1938 Beekman became almost blind and needed assistance in carrying on his sales work. He first called in his brother to assist him. (R. 14, 45-46.) Then (at some date after the Oklahoma State Legislature had adjourned, early in 1938) Beekman formed a partnership under the name of C. S. Beekman & Company. This partnership was composed of C. S. Beekman, H. E. Beekman, Allen G. Nichols, J. C. Nance, James Nance, and Howard Drake. Nichols was a member of and Democratic leader of the Oklahoma Senate, J. C. Nance was a member of the House and leader of the Democratic majority of that body, and Howard Drake was prominent in state politics and had managed the campaign for the election of Governor Marland. (R. 14, 43, 45.)

At the request of C. S. Beekman the checks for the payment of the commissions which were due him under his contract with the taxpayer were made payable to C. S. Beekman & Company or to C. S. Beekman Company. Likewise the three claims of the taxpayer against the State of Oklahoma in the aggregate amount of \$16,893.70 were assigned on January 14, 1938, to "C. S. Beekman Co." Of the amounts received by the partnership one-fourth belonged to Nichols, one-fourth to J. C. Nance and one-fourth to Drake. The split of the

balance is not shown by the record. (R. 14, 28-29, 45, cf. R. 52.)

Taxpayer deducted in its 1938 return, as ordinary and necessary expenses, the commissions paid under its agreement with Beekman in the amount of \$32,937.75. The Commissioner disallowed the deduction, upon the ground that these payments were against public policy. (R. 7-8.) The Board of Tax Appeals found (R. 18-19) that the taxpayer paid Beekman the commissions with the knowledge that at least a part of them would go to persons prominent in politics of the State of Oklahoma, for the exertion of political influence, and held (R. 15, 19) that the commission so paid were not ordinary and necessary expenses paid or incurred in carrying on the taxpayer's trade or business. The Circuit Court of Appeals affirmed (R. 54).

ARGUMENT

1. The Circuit Court of Appeals held (R. 53) that there was substantial evidence to support the finding of the Board (R. 14, 18) that at least a portion of the \$32,937.75 received by the partnership as "commissions" represented payment for the exertion of political influence and that as the taxpayer had not shown what part, if any, represented payment for legitimate services, the entire deduction had been properly disallowed. Cf. *Burnet v. Houston*, 283 U. S. 223, 227-228. We submit that the Circuit Court of Appeals was

correct in holding that the evidence justified the finding of the Board.² The determination of the Board should therefore be conclusive upon appeal. See *Helvering v. Rankin*, 295 U. S. 123, 131; *Helvering v. Kehoe*, 309 U. S. 277, 279; *Wilmington Trust Co. v. Commissioner*, 316 U. S. 164, 168.

2. The decision below accords with *Textile Mills Corp. v. Commissioner*, 314 U. S. 326, where this Court refused to sanction the deduction, as an ordinary and necessary business expense, of lobbying expenditures to procure legislation. The principle implicit in that decision is that since such expenditures are against public policy, they cannot be regarded as "ordinary and necessary," and are therefore not deductible. The payments which the taxpayer made here, for the political influence which Beekman and his associates were able to exert, are subject to like condemnation, not only upon grounds of general public policy but also under the provisions of the Constitution of the State of Oklahoma, Section 23 of which (Appendix, *infra*, pp. 9-11) for-

² See Beekman's testimony that the other partners "went out and worked up the propositions" (R. 46); that contacting the members of the State Highway Commission was "a part of the service which they [Nichols and J. C. Nance] performed" (R. 47); and concerning the daily visits of the other partners to the office of the State Highway Department and the presence of Farmer there on the average of once a week (R. 48).

bids any member of the Legislature during his term of office or within two years thereafter, to be "interested, directly or indirectly, in any contract with the State, or any county or other subdivision thereof, authorized by law passed during the term for which he shall have been elected." See *Baskin v. State ex rel.*, 107 Okla, 272, 274, last paragraph; *Rugel v. Commissioner*, 127 F. 2d 393 (C. C. A. 8th).

Though the decision in the instant case may conflict in principle with *Heininger v. Commissioner*, 133 F. 2d 567 (C. C. A. 7th), certiorari granted, June 14, 1943 (No. 63, this Term), that circumstance does not seem to warrant the granting of certiorari here. The decision of the Seventh Circuit in the *Heininger* case was contrary to many decisions of the circuit courts of appeals and probably conflicted with the decision of this Court in the *Textile Mills* case, *supra*. The decision below in the instant case, on the other hand, follows the current of authority in the lower courts and is consistent with, and probably required by, the decision in the *Textile Mills* case.³ *Alexandria Gravel Co. v. Commissioner*, 95 F. 2d 615 (C. C. A. 5th), which is also relied upon by the taxpayer (Pet. 6), was decided

³ The *Heininger* case is being held for argument in November. If the Court be in doubt as to certiorari in the present case, action upon the petition might be postponed until disposition of the *Heininger* case.

prior to the *Textile Mills* case and in any event is readily distinguishable. The court there assumed (p. 616) "a corrupt expenditure to secure public contracts * * * to be unallowable"; decision went on the ground that there was "no evidence" that the sales agent had agreed "to exert any personal influence to secure contracts," or that he had ever done so. In the present case, moreover, the activities in question were forbidden by Section 23 of the Oklahoma Constitution. In the *Alexandria Gravel* case the court observed (p. 616) that there was no Louisiana law which prohibited "members of its Legislature from dealing with administrative bodies."

CONCLUSION

The petition for a writ of certiorari should be denied.

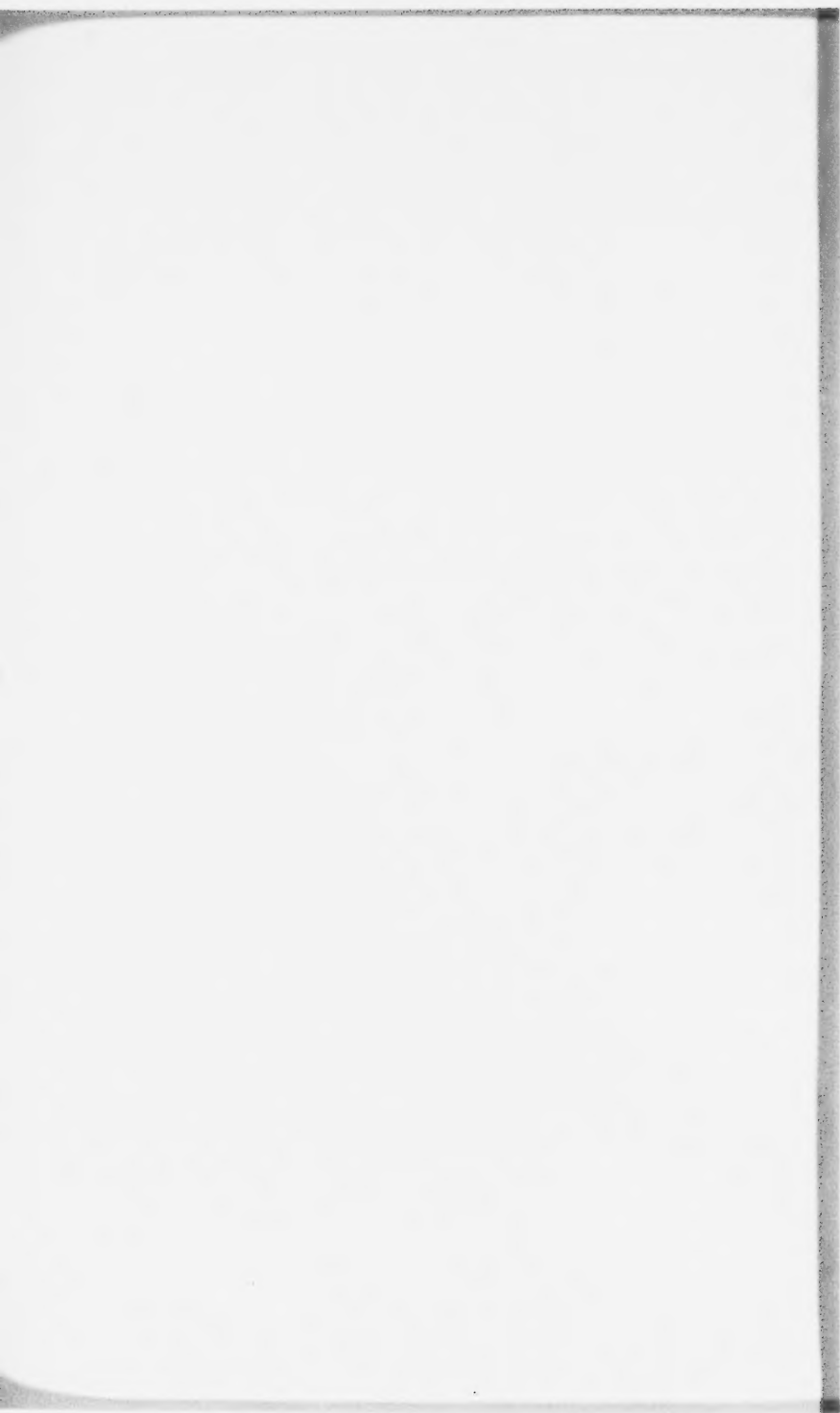
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NOVEMBER 1943.





APPENDIX

Revenue Act of 1938, c. 289, 52 Stat. 447:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) *Expenses.*—

(1) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

* * * * *

Treasury Regulations 101, promulgated under the Revenue Act of 1938:

ART. 23 (q)–1. *Contributions or gifts by corporations.*—* * *. Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses are not deductible from gross income.

* * * * *

Constitution of the State of Oklahoma:

ART. V.

§ 9. *Membership and term of office.*—

The Senate, except as hereinafter provided, shall consist of not more than forty-four members, whose term of office shall be four years: *Provided*, That one senator elected at the first election from each even numbered district shall hold office until the fifteenth day succeeding the regular state election in Nineteen Hundred and Eight, and one elected from each odd numbered district at said first election shall hold office until the fifteenth day succeeding the day of the regular state election in Nineteen Hundred and Ten: * * *.

* * * * *

§ 10. *Number and terms—Meeting of first Legislature—Apportionment—Review of apportionment.*—The House of Representatives, until otherwise provided by law, shall consist of not more than one hundred and nine members who shall hold office for two years: *Provided*, That the representatives elected at the first election shall hold office until the fifteenth day succeeding the day of the regular state election in Nineteen Hundred and Eight: * * *.

* * * * *

§ 23. *Ineligibility to appointment to office—Interest in contracts.*—No member of the Legislature shall, during the term for which he was elected, be appointed or elected to any office or commission in the State, which shall have been created, or the emoluments of which shall have been increased, during his term of office, nor shall any member receive any appointment from

the Governor, the Governor and Senate, or from the Legislature, during the term for which he shall have been elected, nor shall any member, during the term for which he shall have been elected, or within two years thereafter, be interested, directly or indirectly, in any contract with the State, or any county or other subdivision thereof, authorized by law passed during the term for which he shall have been elected.

* * * * *

§ 26. *Date of meeting of legislature.*—The members of the Legislature shall meet at the seat of government on the first Tuesday after the first Monday in January at twelve o'clock, noon, in the year next succeeding their election, or upon such other day as may be provided by law.

§ 27. *Regular biennial sessions—Special sessions.*—The Legislature shall hold regular biennial sessions as herein provided, but this shall not prevent the calling of a special session of the Legislature by the Governor.